AYOB ABDUL JABAR *a*

v.

PP

HIGH COURT MALAYA, KUALA TERENGGANU *b*
ABDUL KADIR SULAIMAN J
[CRIMINAL APPEAL NO: 41-97-98]
2 AUGUST 1999

CRIMINAL PROCEDURE: *Sentence - Appeal against sentence - Appellate court, power and duty of - When may appellate court disturb sentence imposed by lower court - Opinion of appellate court that it would have imposed lighter sentence had it heard case at first instance - Whether this justifies reduction in sentence* *c*

CRIMINAL PROCEDURE: *Sentence - Concurrent or consecutive - More than one offence infringing same section of particular law - Whether distinct offences - What amounts to distinct offences - Whether sentences should run concurrently or consecutively* *d*

The appellant pleaded guilty to four charges of house-breaking under s. 457 of the Penal Code and to one charge of resisting lawful apprehension under s. 224 of the Penal Code. He was convicted and sentenced on each charge and the sentences were ordered to run consecutively resulting in the appellant having to serve a total of 17 years imprisonment and having to pay a fine of RM12,000. The appellant appealed against the sentences imposed and prayed for an order that the sentences be reduced and to run concurrently and that the fine imposed be dropped. *e* *f*

Held:

[1] The fact that the appellate court is of the opinion that it would have imposed a lighter sentence had it heard the appellant's case at first instance is irrelevant. The appellate court will disturb the sentence meted out by the lower court only if the sentence is manifestly excessive or inadequate or if the court below had proceeded on wrong principles or given undue weight to some of the evidence. *g*

[2] There is no basis to disturb the sentences imposed in respect of the offences committed by the appellant. It was a matter for the discretion of the learned magistrate and in dealing with the appellant, the right principles had been applied. The sentence imposed is not grossly excessive or illegal or otherwise an improper sentence having regard to all the facts disclosed on the record. *h* *i*

[3] Each distinct offence must be dealt with separately when imposing sentence. Offences in respect of infringements of the same section of a particular law must be regarded as distinct if the offences were committed against different persons or at different times or at different places. In the instant appeal, each of the five offences was committed at a different date, time, place and upon different persons. Thus, the offences committed are distinct offences and further, each offence is a principal offence. In these circumstances, the sentence imposed in respect of each offence cannot be concurrent with one another.

[Appeal dismissed.]

Case(s) referred to:
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Yap Huat Heng [1985] 2 MLJ 414 ***(refd)***
R v. Leo De Cruz [1935] MLJ 1 ***(refd)***
R v. Teo Cheng Lian [1949] 15 MLJ 170 ***(refd)***
Re Vir Singh [1898] SSLR Supp 6 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 294
Dangerous Drugs Ordinance 1952, s. 12(2)
Penal Code, ss. 224, 457, 477A

For the applicant - in person
For the respondent - Wan Mohd Norhisham Yaacob DPP

Reported by S Dharmendran

JUDGMENT

Abdul Kadir Sulaiman J:

The appellant was charged on 15 November 1998 in the Magistrates Court, Kemaman, Terengganu on the following four charges under s. 457 and on one charge under s. 224 of the Penal Code:

(1) **K83-298-98**

Bahawa kamu di antara jam 9 pagi 29 Mei 1998 hingga jam 2.50 pagi 31 Mei 1998 di rumah No. 1046, depan Mini Stadium, Kampong Mak Chili, Cukai, di dalam daerah Kemaman, dalam Negeri Terenganu, di dapati kamu dengan niat jahat telah memecah masuk ke dalam sebuah rumah seorang lelaki Melayu nama: Abu Bakar bin Mohd. Noor, KP: 520731-11-5047 dengan niat untuk mencuri dan telah mencuri seutas kalong berlian, seutas gelang tangan emas jenis bulat, dua pasang subang berlian, sebentuk cincin suasa zamrud berlilit berlian, dua loket emas, tiga

utas gelang zulian dan wang tunai campur-campur RM300 kerugian RM18,270 yang mana kamu melakukannya selepas matahari masuk dan sebelum matahari terbit. Oleh itu kamu telah melakukan suatu kesalahan yang boleh dituduh dan dihukum di bawah s. 457 Kanun Keseksaan.

(2) **K83-295-98**

Bahawa kamu pada 10 September 1998 diantara jam 2 petang hingga jam 11 malam pada 12 September 1998 di sebuah rumah di alamat 1973, Jalan Gong Limau, Cukai di dalam daerah Kemaman dalam Negeri Terengganu, didapati kamu dengan niat jahat telah memecah masuk ke dalam sebuah rumah seorang lelaki Melayu nama: Anwar bin Yassin KP: 570204-05-5527 dengan niat untuk mencuri dan telah mencuri sebuah set radio jenis Hi Fi Sony S/No: 3303555 warna hitam yang mana kamu melakukannya selepas antara matahari masuk dan sebelum matahari terbit. Oleh itu kamu telah melakukan suatu kesalahan dituduh dan dihukum di bawah s. 457 Kanun Keseksaan.

(3) **K83-296-98**

Bahawa kamu pada 1 Ogos 1998, diantara jam 6 petang hingga jam 11.30 malam, di rumah No. 26, Jalan Ciku, Lot 144, Cukai, di dalam daerah Kemaman, dalam Negeri Terengganu, didapati kamu dengan niat jahat telah memecah masuk ke dalam sebuah rumah seorang lelaki Melayu nama: Abdullah bin A. Karim KP: 610515-01-5999 dengan niat untuk mencuri telah mencuri satu bentuk cincin emas berlian, tiga bentuk cincin emas, dua utas gelang emas, kerugian RM3,000 yang mana kamu telah melakukannya selepas diantara matahari masuk dan sebelum matahari terbit. Oleh itu kamu telah melakukan suatu kesalahan yang boleh dituduh dan dihukum di bawah s. 457 Kanun Keseksaan.

(4) **K83-297-98**

Bahawa kamu diantara jam 12.45 tengahari 10 September 1998 hingga jam 7.58 pagi 12 September 1998, di sebuah pejabat Mara Daerah Kemaman, No. K-600 S, Tingkat 1, Bangunan Aked Mara, Jalan Pasar, Cukai di dalam daerah Kemaman, dalam Negeri Terengganu, didapati kamu dengan niat jahat telah memecah masuk ke dalam pejabat tersebut dengan niat untuk mencuri dan telah mencuri wang tunai campur-campur bernilai RM286.40, tiga bentuk loket berlian, dua utas kalung berlian, tiga utas rantai tangan berlian, tiga bentuk cincin berlian, dua pasang subang berlian, dua utas loket batu hijau keliling berlian, tiga utas rantai tangan emas, lima utas rantai leher emas, satu utas gelang tangan emas, sepasang gelang tangan emas, satu keping loket emas berbentuk syiling, dua pasang subang berlian swis batu merah, satu utas loket intan, tiga utas barang kemas lama

yang telah putus. Kerugian RM11,286.40 kepunyaan seorang lelaki Melayu nama: Zaki @ Ngah bin Jusoh @ Yusof KP: 460707-11-5037 yang mana kamu lakukannya selepas diantara matahari masuk dan sebelum matahari terbit. Oleh itu kamu telah melakukan suatu kesalahan dituduh dan dihukum di bawah s. 457 Kanun Keseksaan.

(5) **K83-299-98**

Bahawa kamu pada 14 Oktober 1998, kira-kira jam 3.45 petang di lokap Mahkamah Magistret Kemaman, Cukai, di dalam Daerah Kemaman di dalam Negeri Terengganu didapati kamu dengan sengaja melepaskan diri dari kurungan lokap di mana kamu ditahan dengan sah di sisi undang-undang dengan membuka kunci mangga yang tidak berkunci. Oleh itu kamu telah melakukan kesalahan yang boleh dituduh dan dihukum dibawah s. 224 Kanun Keseksaan.

To all the said charges the accused unconditionally pleaded guilty. The learned magistrate convicted him, and passed the sentences accordingly. From the record this was the first time the appellant was ever charged in court. Before passing sentence the appellant pleaded in mitigation that his mother was in hospital and he promised that he would not commit any offence again in future. In return, the prosecution applied for deterrent sentences to be imposed on him as it involves offences of housebreaking and theft involving a big loss to the victims and that the appellant escaped from the lawful custody. Having considered all the arguments, the learned magistrate imposed the following sentences on the appellant in respect of the five offences. In respect of the first case, the appellant was sentenced to two years imprisonment to take effect from the date of arrest and to a fine of RM5,000 and in default to suffer six months imprisonment in lieu. For the second case the appellant was sentenced to three years and six months imprisonment with a fine of RM1,000 and in default six months imprisonment in lieu. For the third, the appellant was sentenced to six years and six months imprisonment and a fine of RM1,000 and in default to an imprisonment of six months in lieu. As for the fourth case, the appellant was sentenced to six years imprisonment with a fine of RM5,000 with six months imprisonment in default. It is to be noted that all the four cases involve offences under s. 457 of the Penal Code. As for the fifth case of escaping from the lawful custody under s. 224 of the Penal Code, the learned magistrate imposed on the appellant an imprisonment term of six months with no imposition of fine. However, in respect of the five offences, the learned magistrate ordered the sentences to run consecutively, resulting in all to a total of 17 years imprisonment and RM12,000 fine and in default to suffer 24 months imprisonment.

The appellant was aggrieved with the sentences imposed and appealed to the High Court. The appeal came up for disposal before me on 15 June 1999. It is to be noted that both before the learned magistrate and before me in the appeal, the appellant acted in person. According to his petitions of appeal the Appellant prayed that the sentences imposed on him in respect of the five cases be reduced and be ordered to run concurrently. He regretted for having committed the said offences and promised not to repeat.

At the hearing of the appeal, the appellant asked the court to substitute the consecutive sentences of imprisonment imposed by the learned magistrate to one which are concurrent and to further reduce the imprisonment terms. As to the sentences of fine imposed he asked the court to drop them altogether as he was not able to pay the fines. He came from a poor family and his mother with whom he lived was suffering from diabetes. His father has long passed away. He was the sole breadwinner in the family. He was 24 years of age.

Indeed it is a sad state of affairs. The reply by the learned DPP was very brief. Encik Wan Mohd. Norhisham, in asking for the appeal to be dismissed, submitted that the sentences imposed by the learned magistrate are in accordance with law and are reasonable. The amount involved in the commission of the offences is big.

At the end of it, having considered the matter, I dismissed the appeal of the appellant. He now appeals to the Court of Appeal against my said decision. I now provide my reasons for the dismissal. As I said earlier, the case of the appellant before me is a pathetic one but acting in an appellate position, I am not to be swayed by emotion in the sense that if I were to hear the appellant's cases at first instant, I would have given him lighter sentences contrary to what the learned magistrate had imposed. The principles to be adopted by a court hearing an appeal from the decision of a lower court in a matter such as this is settled. The appellate court will disturb the sentence meted out by the lower courts only if the sentence is manifestly excessive or inadequate or that the court below had proceeded on wrong principles or given undue weight to some of the evidence. In *R v. Leo De Cruz* [1935] MLJ 1, in the court below, the appellant was convicted on three charges of the offence of falsifying accounts under s. 477A of the Penal Code and was sentenced to three years imprisonment on each charge, the sentence to run concurrently. He appealed to the Court of Criminal Appeal on the ground that the sentence was excessive in of the fact that he was only 24 years of age, with no previous conviction and the amount involved is not more than $50. In a short judgment of the court delivered by Huggard CJ, he said this:

> In regard to appeals against sentence it has been laid down that the Court will not interfere with the sentence, unless the Judge has proceeded on wrong principles or given undue weight to some of the evidence. ... Therefore although it is possible that we, had we been sitting as individual judges, might have been inclined to impose a lesser sentence, we feel we are bound by the decisions laid down, and this appeal must therefore be dismissed.

In *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256, a case brought up for revision by the High Court over the decision of the court below, the same principles are being applied on sentencing as are in the case of an appeal. The accused, a first offender, pleaded guilty to a charge of possession of dangerous drugs, an offence under s. 12(2) of the Dangerous Drugs Ordinance, 1952. He was bound over in the lower court under s. 294 of the Criminal Procedure Code. Hashim Yeop A. Sani J (as he then was) on revision has this to say at p. 257:

> The principles to be applied in imposing sentence however are the same in every case. The High Court sitting in exercise of its revisionary powers will not normally alter the sentence unless it is satisfied that the sentence of the lower court is either manifestly inadequate or grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the court ought to take judicial notice of, that is to say, that the lower court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly established practice that the court will not alter a sentence merely because it might have passed a different sentence.

In *re Vir Singh* [1898] SSLR Supp 6 Jackson JC said:

> I never interfere with a magistrate's sentence unless a very strong case of error, prejudice, and severity based on wrong principles, can be shown to me.

In *R v. Teo Cheng Lian* [1949] 15 MLJ 170, Gordon Smith J at p. 171 has this to say on the subject:

> ... Normally the appeal Court should not interfere with the discretion of the Court below in regard to sentences and I agree entirely with the principles enunciated in Gumbs Case that I have referred to. A lower Court is more in touch with the local affairs and daily comings and goings of the greater part of the community than is the High Court and is, in my opinion, in a better position to exercise a discretion in the matter of sentences, more particularly in respect of minor offences and breaches of the law that are of almost of daily occurrence. Such sentences should not, in my opinion be interfered with by a higher Court, merely because the individual presiding in the higher Court might, having personal views on the matter, have passed a different sentence.

> There must be a manifest error, either in law or in considering the facts and circumstances of the case or an omission to consider such facts and circumstances, before the higher Court interferes with the discretion undoubtedly vested in the lower Court.

With the above settled principles in the forefront of my mind, and having considered the grounds of decisions of the learned magistrate and the submissions made, and having considered that the appellant was not represented either in the court below or before me in this appeal, I still cannot find a basis to disturb the sentences so imposed in respect of the offences committed by the appellant. It is a matter for the discretion of the learned magistrate and I find that in dealing with the appellant, he had applied the right principle. The sentence he imposed is not grossly excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed on the record.

Now, as to the consecutiveness of the sentences of imprisonment in respect of the five offences. The appellant asks this court to substitute them to be concurrent. Of course, if he succeeds, a total of 17 years imprisonment imposed upon him for the five offences will be reduced to only three years and six months if allowed to run concurrently. The lesser terms of imprisonment will be eaten up by the highest term imposed in case No. K83-295-98. There ought to be a basis for the appellant to succeed on this ground of appeal. No reason was given except to say that he was a first offender and came from a poor family of which he was the breadwinner and further that his mother was hospitalised. If upon these reasons that the court ought to substitute consecutive sentences for concurrent then any other convicted person under similar circumstances cannot be given consecutive sentences at all.

In *PP v. Yap Huat Heng* [1985] 2 MLJ 414, Shaikh Daud J (as he then was) said at p. 416:

> Where two or more distinct offences had been committed, sentences of imprisonment should not be made to run concurrently. It should only be made concurrent when an offender had been convicted of a principal and a subsidiary offence. In all other cases sentences should be made to run consecutively.

I cannot agree more with the view so expressed by His Lordship that each offence must be dealt with separately when imposing sentence. All the offences may be in respect of infringements of the same section of a particular law but for this purpose each of those offences must be regarded as distinct if the offences were committed against different persons or at different times or at different places. Taking the cases of this appellant, each of the five offences for which he was convicted, was committed by him at a different date, time,

place and upon different persons. For that reason the offences committed are distinct to one another. Further, each of them is a principal offence. Under those circumstances, the sentence imposed in respect of each cannot be concurrent with one another. That being the case, it is a wrong exercise of the discretion to order the sentences in respect of those five distinct offences to run concurrently. The learned magistrate was therefore, correct in ordering the sentences of imprisonment to be consecutive.

For all the above reasons this appeal ought to be dismissed which I so ordered.